United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7185

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7185

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P/S

CINEMA 5, LTD.,

Plaintiff-Appellant,

—against—

CINERAMA, INC., NATIONWIDE THEATRES CORP., CONSOLIDATED AMUSEMENT CO., LTD., PACIFIC THEATRES CORPORATION, ATLANTIC THEATRES CORP. OF CALIFORNIA, RKO-STANLEY WARNER THEATRES, INC., WILLIAM R. FORMAN, MICHAEL R. FORMAN and JAMES J. COTTER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a Memorandum and Order dated February 14, 1975, of The Honorable Charles L. Brieant, Jr., United States District Judge, Southern District of New York, granting defendants' motion to disqualify plaintiff's counsel.* The parties waived an

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* A copy of Judge Brieant's unreported Memorandum and Order is at page 117a of the Joint Appendix.

evidentiary hearing and agreed to submit the motion upon a stipulation of facts and affidavits.

Judge Brieant stated that the alleged conflict arises from the fact that defendant Cinerama and one of its subsidiaries not involved here are defendants in two cases in the Western District of New York where they are represented by a regional law firm (hereinafter the "Buffalo firm") "which has no relationship with the firm sought to be disqualified here [hereinafter "Webster Sheffield"], except that one attorney is a partner both of [Webster Sheffield] and that firm." (118a).* Judge Brieant also found that the cases in the Western District are unrelated to this case but each requires specialized knowledge concerning the booking and distribution of motion pictures generally, although in different market areas; the value and nature of the Buffalo firm's representation is minimal; and "movant's protestations taste of crocodile tears." (118a-119a). Nevertheless, Judge Brieant

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* All page references, unless otherwise indicated, refer to pages of the Joint Appendix.

disqualified plaintiff's counsel to avoid even the appearance of professional impropriety. (119a). At reargument where Judge Brieant adhered to his original decision, he stated he had made no finding of wrongdoing on the part of plaintiff's counsel and that "I am satisfied in fact there wouldn't be an impropriety." (156a-157a).

Plaintiff contends that Judge Brieant's apparently reluctant decision to disqualify its counsel was based on the application of an incorrect legal standard to the clear and virtually uncontroverted facts herein.

QUESTION PRESENTED

Did the Court below abuse its discretion in disqualifying plaintiff's counsel when the representations at issue are not substantially related?

FACTS

Background

The alleged conflict arises from Webster Sheffield's representation of Cinema 5 in this case and the Buffalo firm's representation of Cinerama in the Western District cases. These are the representations at issue in this appeal.

Webster Sheffield has represented Cinema 5 and its predecessors with regard to general corporate matters and litigation since 1958. As a result of this long and close relationship, Webster Sheffield has become fully familiar with the business and legal problems of Cinema 5. Cinema 5 has relied on Webster Sheffield for legal advice over the years and has developed an excellent working relationship with Webster Sheffield in whom it has complete confidence. Moreover, Webster Sheffield has been involved in this lawsuit since its inception and is fully familiar with it. (Affidavit of Donald S. Rugoff, President of Cinema 5, at 108a-110a).

The Buffalo firm was retained by Cinerama in January, 1972. As found by the court below, the

Buffalo firm's representation of Cinerama was "minimal" and the Buffalo firm has no relationship with Webster Sheffield except that Manly Fleischmann is a partner in both firms. (118a-119a).

As soon as this case was filed, Cinerama's California counsel called Mr. Fleischmann and stated that Webster Sheffield should withdraw from the case because it had a conflict of interest due to the Buffalo firm's representation of Cinerama in the Western District. Webster Sheffield considered this claim and concluded the representations were totally unrelated and there was no conflict. Mr. Fleischmann, by letter, so informed Cinerama's California counsel and the Buffalo firm offered to withdraw from the Western District cases if Cinerama so desired. No reply to this letter has been received. (Mr. Fleischmann's Affidavit, at 23a-28a).

Subsequently, all the defendants in this case moved to disqualify plaintiff's counsel. (First Paragraph of the Stipulation of Facts at 31a).

The only issue on this appeal is whether the representation of Cinerama by the Buffalo firm is substantially related to Webster Sheffield's representation

of Cinema 5 in this case. The record conclusively establishes that the legal and factual issues in the cases are unrelated and that there is no apparent, real or potential conflict which requires the disqualification of Webster Sheffield.

This Action is Not Substantially Related to the Western District Cases.

This action and the Western District cases are legally and factually unrelated. The parties are different, the nature of the alleged illegal conduct is different, the remedies sought are different, and the facts involved are different. In short, comparing the Western District cases and this action is like comparing apples and oranges.

This Action

Here, Cinema 5 seeks to prevent an illegal take-over by defendant Forman through corporations owned and controlled by him, including Cinerama. (Verified Complaint herein at 8a-9a). The first cause of action is based on defendants' false and misleading filings with the Securities and Exchange Commission. The second and third causes of action

allege that if defendants are successful in acquiring control of Cinema 5, this would violate the federal antitrust laws in that Forman and his corporations would control approximately 33% of the first-run theatres in Manhattan, which comprise a unique market in which motion pictures have their premiere engagements in this country and often in the world. Such control would constitute almost a per se violation of the Clayton Act. Cinema 5 seeks an injunction preventing Forman and his corporations from voting their illegally acquired shares of Cinema 5, divestiture of those shares and fr[illegible] seeking proxies or influencing the management of Cinema 5. (Verified Complaint herein at 5a-22a).

The Western District Cases

The first complaint, filed in the Western District in December, 1971 (36a-44a), includes as defendants Cinerama, its wholly-owned distribution subsidiary, Cinerama Releasing Corporation (hereinafter "CRC") and 14 other distributors and exhibitors, and alleges a conspiracy in the Rochester metropolitan area. The subsequent case, brought in 1974 (80a-90a), was brought by the same plaintiff against roughly the same

defendants, but only Cinerama's subsidiary is named as a defendant. It alleges an identical conspiracy with regard to the Buffalo metropolitan area. The Buffalo firm also represents another distributor defendant in these cases, National General Pictures Corporation. (Mr. Fleischmann's Affidavit at 25a).

These are typical movie antitrust cases in which a theatre owner (exhibitor) complains that the major motion picture distributors have conspired among themselves and with certain favored local theatres to deprive plaintiff of the right to obtain pictures for its theatre. In these cases, Cinerama and CRC are defined as "distributor defendants" along with others such as Columbia Pictures, United Artists, Paramount, Metro-Goldwyn-Mayer and National General Corporation. (Western District Complaints at 41a and 84a).

In the Rochester case,the conspiracy is alleged to have "the purpose and effect of damaging and destroying the business of plaintiffs in or about Rochester, New York." (41a). Identical allegations are made in the Buffalo case with regard to the Buffalo area. (87a-88a).

It is clear therefore, that these cases are limited by the allegations in the complaints to the Rochester and Buffalo areas, respectively. Cinerama and CRC are involved only as distributors of motion pictures, together with many other distributors and some favored local exhibitors. The plaintiffs seek treble damages already suffered as a result of the conspiracy. (44a and 89a-90a).

The Cases are Unrelated.

The parties in the cases are different. In the Western District cases, the defendants are Cinerama, its distribution subsidiary, CRC, the other major film distributors and certain local exhibitors. Cinema 5 is not a defendant. Here, the defendants are Forman, Cinerama, its exhibition subsidiary, RKO-Stanley Warner Theatres, Inc. (hereinafter "RKO"), other corporations owned and controlled by Forman and some of his associates. There are no defendants which are not controlled by Forman. (Verified Complaint herein at 8a-9a).

The nature of the alleged illegal conduct is different. In the Western District cases, plaintiffs

complain that the defendants have injured them through a conspiracy which prevents plaintiffs from obtaining films to show in their theatres. Plaintiffs seek treble damages for injuries already suffered. Here, Cinema 5 seeks to enjoin an illegal take-over, alleging violations of the Securities and Exchange Act of 1934 as well as the antitrust laws. Obviously, the allegations with respect to the Securities and Exchange Act have nothing to do with the Western District cases -- nor do the antitrust allegations in this case, where there are no allegations that the defendants have conspired with outside parties to injure Cinema 5.

Cinerama's distribution practices are not involved here. There are no allegations in this complaint that Cinema 5 competes with Cinerama in the distribution of motion pictures. There are no allegations that Cinema 5's theatres have been deprived of the opportunity to exhibit motion pictures by the actions of the defendants. Rather, the allegations are that if Forman is successful in acquiring control of Cinema 5, he and his corporations will control such a large number of the first-run theatres in Manhattan that such

control would constitute almost a per se violation of the Clayton Act. Cinema 5 seeks an injunction to prevent a prospective violation of the antitrust laws which would involuntarily involve Cinema 5 itself (See paragraph 39 of Verified Complaint herein at 19a-20a), not treble damages for past violations.

Furthermore, the antitrust allegations in this case deal with a unique market, first-run theatres in Manhattan. This market is unique in the world and is not comparable to any other, especially Buffalo and Rochester. (See paragraphs 33 and 37 of Verified Complaint herein at 16a-18a). The nature of the prospective antitrust violations in this case depends on the ownership and control of first-run theatres in Manhattan and does not involve the distribution practices of Cinerama or any other company as in the other cases.

Finally, the factual issues in the two cases are totally unrelated. In the Western District cases, the inquiry will focus on whether or not independent distributors and certain favored local exhibitors conspired and injured the plaintiffs in Buffalo and Rochester by depriving them of product. In this case, the

inquiry will focus on whether Forman seeks illegally to acquire control of Cinema 5 through a maze of corporations he owns and controls. The use of this corporate maze is alleged to violate the Securities and Exchange Act and is an attempt to conceal the prospective antitrust violations. (Paragraph 22 of Verified Complaint herein at 12a-14a). Just as the Western District cases are typical antitrust cases, this case appears to be a typical take-over battle. The mere fact that the cases involve antitrust questions does not make them related.

There Is No Apparent, Real Or Potential Conflict.

Since there is no relationship between the Western District cases and this case, let alone any substantial relationship, there is no reason to disqualify Webster Sheffield. Furthermore, the record clearly shows that there is no apparent, real or potential conflict of any kind arising from the fact that Mr. Fleischmann is a partner in both firms.

In early 1972, Cinerama, CRC and another defendant, unrelated to Cinerama, National General

Pictures Corporation, retained the Buffalo firm to represent them in the Rochester case. It is clear from the record that Cinerama did not consider that case or the subsequent one in Buffalo to be of major consequence, since the Buffalo firm was instructed to minimize expenses. (See Mr. Fleischmann's Affidavit at 24a-26a, and letters at 57a and 95a).

In keeping with these instructions, the Buffalo firm has attended only two days of depositions, (See letter at 66a), and did not attend others, (See letter at 77a). California counsel for Cinerama drafted the answers in both cases and also prepared the answers to interrogatories and response to the request for admissions. (See letters at 49a,57a,59a,60a,77a, and 94a).

The correspondence clearly shows that California counsel maintained control of these lawsuits, drafted all the papers and instructed the Buffalo firm to keep "a low profile," (See letter at 95a), and to allow the other defendants to take the lead in discovery. (See letters at 57a and 62a).

Paragraph 3 of Mr. Fleischmann's Affidavit states specifically what he has done on the Western

District cases. (24a-26a). His work has been minimal. He has had absolutely no involvement in this case. (Paragraph 4 of Mr. Fleischmann's Affidavit at 26a). Mr. Fleischmann has not recorded any hourly charges with regard to the Western District cases since May, 1972. Prior thereto, he spent 22 hours on the cases, half of which was billed to National General Pictures Corporation. The first purchase of Cinema 5 stock by the defendants in this case was in February, 1974, almost two years later. The total fee billed to Cinerama by the Buffalo firm is $3,865, which is convincing proof that the Western District cases are not major antitrust actions. (Mr. Fleischmann's Affidavit at 25a-26a).

It is clear, therefore, that no information has been transmitted to the Buffalo firm which could in any way prejudice Cinerama in this case. Defendants could not and did not show that the Buffalo firm received confidential information from Cinerama which relates to this action or that any confidential information was disclosed to the Buffalo firm. Consequently, the court below stated that there was no wrongdoing on the part of Webster Sheffield and that, in fact, there would not be any impropriety in its continuing representation of

Cinema 5 in this action. (156a-157a).

If there were any doubt at all on that point, it has been dispelled by the defendants themselves in the affirmative actions they have taken as part of the battle for control of Cinema 5. As soon as this complaint was filed in August, 1974, defendants sought to disqualify Webster Sheffield.

On October 4, 1974, Consolidated Amusement Co., Ltd. (hereinafter "Consolidated"), a defendant in this case which is owned and controlled by Forman and was used by him as a vehicle through which to purchase a substantial block of Cinema 5 stock, (Paragraphs 9 and 16 of Verified Complaint herein at 8a and 10a), filed a derivative action against Cinema 5, its directors and certain purchasers of Cinema 5 stock alleging basically that those defendants were engaged in a conspiracy illegally to retain control of Cinema 5. On October 30, 1974, Consolidated obtained an order to show cause in New York County Supreme Court seeking production of Cinema 5's stockholders' list. (Mr. Cohn's Affidavit at 122a).

The same issues have been raised in the derivative action and the stockholders' list proceeding as exist in this case.

In November, 1974, the Cinema 5 directors and the defendant purchasers filed answers to the derivative suit in which they denied the allegations of the complaint and raised affirmative defenses, one of which reads as follows:

> "The plaintiff cannot fairly and adequately represent the interests of the other shareholders of Cinema 5 in this action in that plaintiff is itself involved in an illegal attempt to gain control of Cinema 5 in violation of the federal securities and antitrust laws, for the benefit of others and to the detriment of Cinema 5 and its shareholders, as more particularly set forth in the Verified Complaint in Cinema 5, Ltd. v. Cinerama, Inc., et al., 74 Civ. 3549 (C.L.B., Jr.), filed in this Court on August 15, 1974." (122a-123a).

The directors and purchasers are represented by Webster Sheffield. Cinema 5 has separate counsel and raised the same affirmative defense. Thus, the defendants in response to Consolidated's derivative action raised exactly the same issues which exist in this case. (123a).

In the derivative case, Cinema 5 and its directors noticed the depositions of Consolidated through William and Michael Forman and James J. Cotter, defendants in this action who are also officers and/or directors of Cinerama (Paragraphs 10-12 of Verified Complaint herein at 8a and 9a), together with a request for the production of documents. Consolidated also served a notice to produce documents and noticed the depositions of Cinema 5's president and another defendant. The depositions and exchange of documents were scheduled for December, 1974, but were postponed due to the illness of one of the witnesses. Subsequently, counsel for Consolidated sought to rearrange new schedules, but no discovery has yet taken place. (Mr. Cohn's Affidavit at 123a).

In the stockholders' list proceeding, Cinema 5, represented by Webster Sheffield, filed a verified answer in which Cinema 5 again raised the same issues involved in this lawsuit. A copy of the complaint in this action was attached to and made a part of Cinema 5's verified answer which alleged:

> "Denies each and every allegation of paragraph 7 and alleges that petitioner desires inspection of the minutes of shareholders' proceedings and the record of shareholders of Cinema 5 in the interest of a business or object other than the business of Cinema 5; to wit, in the interest of William R. Forman ("Forman"), who controls petitioner, and other corporations controlled by Forman, and to assist Forman and said corporations illegally to obtain control of Cinema 5, as more particularly set forth in the Verified Complaint in Cinema 5, Ltd. v. Cinerama, Inc., et al., 74 Civ. 3549 (CLB, Jr.) filed August 15, 1974 in the United States District Court for the Southern District of New York, attached hereto as Exhibit A and made a part hereof. Petitioner is named as a defendant in that case along with Forman and other corporations he controls." (131a-132a).

Cinema 5 also moved to stay the proceeding in New York County Supreme Court on the ground that the actions then pending in federal court involved exactly the same issues. Consolidated opposed the motion for stay, contending that no issue of fact with regard to its good faith had been raised.

In a decision dated December 6, 1974, the New York Court held Consolidated's application and Ciema 5's motion in abeyance pending a report of a special referee on the issues of the good faith of

Consolidated and whether the application was made for proper purposes. It was clear to the New York Court that although Consolidated was the nominal petitioner, Forman was the moving force in that proceeding. The court stated:

> "A reading of his [William R. Forman's] affidavit in support of petitioner's [Consolidated's] application clearly shows that he is the prime mover in this proceeding." (135a).

Cinema 5 contends that just as Forman was the "prime mover" in the stockholders' list proceeding he is the "prime mover" here and in the derivative suit.

Thus, the same issues on which defendants seek to disqualify Webster Sheffield in this case have been raised in the derivative action and in the stockholders' list proceeding, but no motion was made to disqualify Webster Sheffield in those actions. To the contrary, depositions were scheduled in the derivative action which would have covered the same facts and issues as in this case and a hearing was sought in the stockholders' list proceeding on these very same issues as well.

These actions taken by Forman, through

Consolidated, are compelling proof that defendants' claim of a conflict of interest is sham. If there is no conflict in the derivative action and stockholders' list proceeding, there is none here. The inference is compelling if not irresistible that the motion to disqualify Webster Sheffield was designed to gain a tactical advantage by preventing further proceedings in this case brought by Cinema 5 while defendants sought to push ahead with their own actions in their attempt to acquire control of Cinema 5.

There Is No Reason Why Cinema 5 Should Be Severely Prejudiced By Depriving It Of Counsel Of Its Own Choice.

While the interests of Cinerama or any other defendant would not be prejudiced if Webster Sheffield were allowed to continue as counsel, Cinema 5 would be seriously prejudiced if Webster Sheffield's disqualification is upheld. Cinema 5 would be deprived of counsel on whom it has relied for legal advice over the years, with whom it has developed an excellent working relationship and in whom it has complete confidence. (Mr. Rugoff's Affidavit at 108a-110a).

Webster Sheffield has represented Cinema 5 and

its predecessors with regard to general corporate matters and litigation since 1958. It has spent considerable time in factual and legal research in preparing this case and if new counsel has to be retained much of this work would have to be duplicated at considerable expense. In this action defendants have filed a motion to dismiss the second count of the complaint and to dismiss the individual defendants from the case, which motion has been completely briefed and is ready for submission to the Court. In addition, plaintiff's motion for immediate discovery is also ready for submission to the Court. Obviously, new counsel could not be in a position to engage in immediate discovery as would Webster Sheffield. More significant, however, is the fact that Webster Sheffield is fully familiar with the business and legal problems of Cinema 5, and with the various aspects of Forman's attempted take-over of Cinema 5. (109a-110a).

ARGUMENT

In response to the increasing number of motions to disqualify counsel, this Court has recently clarified the standard to be used in striking the delicate balance between the individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. Since ethical problems cannot be resolved in a vacuum, this Court's recent decisions have stated as objective a standard as possible which requires painstaking analysis of the facts and a precise and careful application of the law.

The standard set down by this Court is whether the representations in issue are substantially related. Where the matters are unrelated, the free choice of counsel should not be impaired.

In the legal and factual context of this case, not only are there no grounds to disqualify Webster Sheffield, it is unfair to Cinema 5 to do so. The Court below abused its discretion in ordering disqualification.

POINT I

THERE IS NO LEGAL OR FACTUAL BASIS FOR DISQUALIFICATION IN THIS CASE.

A. The Legal Standard To Be Applied In Disqualification Matters Is Whether The Representations In Issue Are Substantially Related.

Two recent decisions of this Court have stressed the need to strike the delicate balance between a client's right freely to choose his own counsel and the need to maintain the highest ethical standards of professional responsibility. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, Docket No. 74-1104, (2d Cir. May 23, 1975) (Slip op. 3669); Hull v. Celanese Corporation, et al., Docket No. 74-2126 (2d Cir. March 26, 1975) (Slip op. 2539).

Canon 4 of the Code of Professional Responsibility provides that "A lawyer should preserve the confidences and secrets of clients", and Canon 9 provides that "A lawyer should avoid even the appearance of professional impropriety." Such ethical problems, however, cannot be resolved in a vacuum, Silver Chrysler, supra, at 3672, nor can there be a "broad-brush approach to disqualification." Hull, supra, at 2547.

Those cases then stated as objective a standard as possible in applying those canons. Disqualification should be ordered only where the representations in issue are substantially related. Silver Chrysler, supra, at 3675, citing Hull, and at 3681. As shown by the analysis of the cases cited in Hull and Silver Chrysler, disqualification has been ordered where the representations in issue were either exactly the same or the substantial relationship was patently clear. Where there is no substantial relationship, the balance should tip towards the free choice of counsel by the client.

Where, as here, it is clear that there is no relationship, let alone a substantial relationship, between the representations in issue, the motion to disqualify should have been denied. Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), appeal dismissed sub nom Fleischer v. Phillips, 264 F.2d 515 (2d Cir.1959) cert. denied sub nom Fleischer v. Benjamin, 359 U.S. 1002 (1959); Shelley v. The Maccabees, 184 F. Supp. 797 (E.D.N.Y. 1960). See also United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955).

In Fleischer v. A.A.P., Inc., supra, the plaintiff moved to disqualify attorneys representing

three of the defendants on the ground that they formerly represented plaintiff and the plaintiff's interests and associates. The court denied the motion, concluding that there was no substantial relationship between the representations after an exhaustive analysis of the issues. Suffice it to say that in Fleischer there was some relationship, but it was not substantial enough to disqualify the attorneys, who happen to represent the defendants in this case.

In Shelley v. The Maccabees, supra, an action for breach of a contract and conspiracy to induce its breach, the defendant moved to disqualify plaintiff's attorneys, claiming they had theretofore represented the defendant and had as a result obtained confidential information substantially related to the issues in the litigation. The earlier representation consisted of advice in connection with the defendant's transformation from a fraternal benefit insurance society into a mutual insurance company, and assistance in an investigation conducted by the Insurance Department of the State of New York.

The court in Shelley denied the motion to disqualify, stating:

> "Nowhere . . . is there reference to any confidential information allegedly obtained from 'The Maccabees' by [the lawyers sought to be disqualified] during their representation of it, let alone confidences which are substantially related to the issues involved in the instant action.
>
> ". . . the retainers [in the earlier representation] were of a most limited and specific nature. They represented 'The Maccabees' only in [the transformation proceeding and the investigation], matters totally unrelated to the instant case . . . nor have they ever represented any of the individual defendants therein." 184 F. Supp. at 800-801. (Emphasis in original).

Applying the "substantially related" test here, there is no basis for disqualification. The Western District cases are unrelated to this case. And, no confidential information related to this case has been imparted to the Buffalo firm.

B. The Western District Cases Are Unrelated To This Case.

The court below found that the Western District cases are unrelated to this case (118a), which is clearly correct. See pp. 6 -12, supra. The court went on to state that each case requires "extensive, specialized knowledge on the part of counsel concerning the booking and distribution of motion pictures generally,

although in different market areas" (118a) which is unsupported by the record and is clearly erroneous.

The complaint in the Western District cases alleged that Cinerama conspired with other major distributors of motion pictures and exhibitors in Buffalo and Rochester to deprive plaintiffs of the right to exhibit motion picture films in their theatres. Here, Cinema 5 is resisting an illegal take-over attempt by William Forman and corporations he owns and controls. Cinema 5 alleges that these defendants have violated the Securities and Exchange Act of 1934, which alone provides sufficient reason to block the take-over. These allegations have no relation to the Western District cases. In addition, Cinema 5 alleges that if the defendants are successful in their take-over attempt, this will violate the Clayton Act in that the defendants will control 33% of the theatres in the unique, first-run exhibition market in Manhattan. As shown above pp. 6 -12, these issues are totally unrelated to the issues raised in the Western District cases.

Nothing in the record supports the statement of the court below that the booking and distribution of motion pictures generally is an issue in this case. The motion was submitted to the court by the parties without

an evidentiary hearing on a stipulation of facts and affidavits. Nothing submitted by defendants supports that statement and defendants have the burden of proof in this motion. Fleischer, supra at 553.

The record does show, however, that the booking and distribution of motion pictures generally is not relevant to this case. Cinema 5 does not allege that it competes in the distribution of motion pictures with Cinerama. Cinema 5 does not allege that Cinerama either alone or in conspiracy with other distributors and/or exhibitors has deprived Cinema 5 theatres of the right to exhibit motion pictures. Cinema 5 seeks to block an illegal take over. If Forman is successful in gaining control of Cinema 5, Forman and his companies will own or control 33% of the first-run theatres in Manhattan. (Verified Complaint at 16a-22a). These theatres exhibit pictures in their premiere engagements in this country and often in the world. There is no other market like the first-run Manhattan theatre market either in this country or in the world, nor have the defendants presented any evidence that its booking and distribution practices in Buffalo and Rochester or anywhere else have anything to do with first-run theatres in Manhattan. Furthermore, the

corporation which owns or controls Forman's theatres in Manhattan is RKO-Stanley Warner Theatres, Inc. (7a), a defendant in this action but not in the Western District. Here, Cinerama and RKO, its exhibition subsidiary, are defendants. There, Cinerama and its distributing subsidiary, CRC, not a defendant here, are defendants and designated as "distributor defendants."

The mere fact that movie companies and the antitrust laws are involved in the Western District cases and here is not sufficient to require disqualification. In Silver Chrysler the representations in issue involved automobile manufacturers and dealers and their business relationships, but disqualification was not required. The issues in the cases must be substantially related.

In discussing the "substantially related" test, this Court stated in Silver Chrysler, supra, that:

> "Over the intervening years the cases in which disqualification has been granted have also fallen into, or have come close to, the 'patently clear' category...." Slip op. at 3675.

Here, it is "patently clear" that the Western District cases are unrelated to this case let alone "substantially related."

C. There Has Been No Disclosure Of Confidential Material Related To This Case.

If the representations in issue were substantially related, not the case here, it would then not be necessary to show that confidential information was in fact disclosed since "it can reasonably be said" that the disclosure of confidential information might have occurred. Hull, supra at 2546.

In Silver Chrysler, this Court was required to investigate whether or not confidential information had in fact been disclosed to the attorney whose disqualification was sought. There, Chrysler moved to disqualify plaintiff's attorney who had previously been an associate in the law firm which had represented Chrysler generally for many years. While at the law firm, the attorney's major activity was in a case that was not substantially related to the case in issue. (Slip op. at 3679). Consequently, this Court examined the record to determine whether the attorney had received in other matters confidential information that was substantially related to the case in issue while an employee of Chrysler's firm.

It found that the attorney had not received such confidential information and stated:

> "Those cases and the Canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions." Slip op. at 3680.

The court below found that in the Western District cases Cinerama:

> "...[i]s represented by a regional law firm, which has no relationship with the firm sought to be disqualified here, except that one attorney is a partner both of the New York City firm and that firm. He divides his time between the two firms, and at least from about January 27, 1972 until May 27, 1972, had direct responsibility for the defense of the Western New York cases. He had no direct personal relationship with the instant case, nor has he imparted any knowledge whatever to his New York City partners." (118a).

The court below also found that the Buffalo firm's representation:

> "...is minimal, as evidenced by time charges incurred in an amount less than $4,000.00. The connection between the two firms is limited to the fact that they share one partner in common." (119a).

At the hearing on reargument, the court below confirmed that there had been no wrongdoing (156a) and also stated that the court was "satisfied in fact that there wouldn't be an impropriety." (157a). These findings were clearly correct.

Here, defendants had the same opportunity to prove disclosure of confidential information that Chrysler had. Cinerama included in the stipulation correspondence between its general counsel and the Buffalo firm. There is nothing to indicate the disclosure of any confidential information related to this case. As in Silver Chrysler, Cinerama "chose to approach the matter in largely conclusory terms" (Slip op. at 3680) although it had full opportunity to submit any evidence it wished.

The only connection between the Buffalo firm and Webster Sheffield is that Mr. Fleischmann happens to be a member of both firms. The court below found that there has been no impropriety nor would there be any (156a-157a). (See also Mr. Fleischmann's Affidavit 23a-30a). In all the cases reviewed by this Court in Silver Chrysler, only one firm or attorney was involved.

A fortiori, where there are two separate firms involved and there is no substantial relationship between the representations the motion should be denied.

POINT II

IT WOULD BE PATENTLY UNFAIR TO DISQUALIFY CINEMA 5'S COUNSEL IN THIS CASE.

This case is part of a battle for control of Cinema 5. It was brought by Cinema 5 to prevent an allegedly illegal take-over by Forman and corporations he owns and controls. One of those Forman corporations which is also a defendant in this case, Consolidated, has started a derivative action against Cinema 5, its directors and certain purchasers of its stock. It also brought a proceeding in New York County Supreme Court to obtain Cinema 5's stockholders' list. Webster Sheffield represents the directors and purchasers in the derivative case. Cinema 5 has separate counsel. Webster Sheffield represents Cinema 5 in the stockholers' list proceeding.

The derivative action has also been assigned to Judge Brieant and defendants' counsel, in an

affidavit, claims that this case and the derivative case have been "consolidated." (139a). The same issues on which defendants seek to disqualify Webster Sheffield in this case have been raised in the derivative action and in the stockholders' list proceeding. (See pp.15-20, supra).

Despite the fact that the same issues have been raised in all the actions, no motion was made to disqualify Webster Sheffield in the derivative suit or stockholders' list proceeding. To the contrary, in the derivative action depositions were scheduled of Forman and other officers of Cinerama and Consolidated who are also defendants in this action, as well as the president of Cinema 5. The parties also filed requests to produce documents. The depositions and the exchange of documents were adjourned because of the illness of one of the witnesses.

Similarly, the stockholders' list proceeding was brought to a hearing. The court referred the matter to a special referee to determine the good faith of Consolidated in seeking Cinema 5's stockholders' list, and found that a reading of Forman's affidavit "clearly shows that he is the prime mover in this proceeding." (135a)

Cinema 5 contends in the stockholders' list proceeding as it contends here and in the derivative suit, that Forman is the prime mover in this take-over attempt and is using the corporations he owns and controls to achieve that end.

If the depositions had taken place and the documents been exchanged, Webster Sheffield would have deposed Forman and the other officers of Consolidated and Cinerama in exactly the same manner as if the depositions were taken in this case since the same issues are involved. It seems anomalous to say the least that Webster Sheffield is disqualified to review documents and conduct examinations in this case but not in the derivative suit or at the hearing which must be held before the referee in the stockholders' list proceeding.

The actions taken by Forman, through Consolidated and Cinerama, in this case, the derivative case and the stockholders' list proceeding <u>are compelling proof that there is no relationship, let alone a substantial relationship, between this case and those in the Western District. They are also compelling proof that</u>

there is no conflict. Forman and his corporations are not in the least concerned that there were or could be any breaches of confidence. What becomes crystal clear is that defendants in this case are using the motion to disqualify to gain a tactical advantage. The motion halted all proceedings in this case. Meanwhile the derivative action and the stockholders' list proceeding were to be pushed ahead. (Mr. Cohn's Affidavit at 121a-125a).

The court below saw nothing wrong with the defendants seeking to disqualify Webster Sheffield in this case but waiving disqualification in the other cases which involve exactly the same issues. (144a-145a, 161a). We submit such a situation is patently unfair and cannot be justified in logic or in the law.

Unless the order to disqualify Webster Sheffield is reversed, Cinema 5 will be deprived of counsel of long standing which has been involved in this case since its inception. The basis for such disqualification would be that a completely separate law firm in Buffalo, which happens to have a common partner with Webster Sheffield, represents Cinerama in totally unrelated cases managed

and controlled by Cinerama's California counsel in which the Buffalo firm itself had a minimal involvement.

Paraphrasing this Court in Silver Chrysler, Cinerama cannot reasonably expect to foreclose Webster Sheffield from representing Cinema 5 because the Buffalo firm represents Cinerama on unrelated matters. "Although Canon 9 dictates that doubts should be resolved in favor of disqualification, [citation omitted] it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder." Silver Chrysler, supra, at 3681. We submit that the balance here between Cinema 5's right freely to choose its counsel and the need to maintain the highest ethical standards of professional responsibility is not delicate. The weight comes down heavily, if not completely, on the side of Cinema 5's right freely to choose counsel.

POINT III

THE COURT BELOW ABUSED ITS DISCRETION IN DISQUALIFYING CINEMA 5'S COUNSEL

The finding of the district court will be upset upon a showing that an abuse of discretion has taken place. Hull, supra at 2544. Judge Adams in his concurring opinion in Silver Chrysler, supra at 3683, stated that the role of the Court of Appeals in this context is to review the facts found below to determine whether they were clearly in error and to ascertain whether the proper legal tests were correctly applied.

It is obvious that the court below looked on this motion with disfavor. It stated "movants protestations taste of crocodile tears." (119a). It found that the two law firms were not related except for a common partner and that the Buffalo firm's involvement in the Western District cases was minimal. It made no finding that the cases were substantially related. To the contrary, it found the cases unrelated. (118a-119a). It found that there had been no wrongdoing and that in fact there would be no impropriety. (156a-157a).

Nevertheless, the court below felt compelled

to order disqualification based on a misapprehension of this case and a misapplication of the proper legal standard. The court below stated there was sufficient relationship between the firms and the Western District cases and this case "to suggest" that future confidential communications in the former will be inhibited and disqualification is required to avoid even the appearance of professional impropriety. (119a).

It mischaracterized this case as a:

> "...civil anti-trust case ... to recover damages for anti-trust violations arising out of alleged efforts by defendants to 'restrain competition in the acquisition and exhibition of first-run films in Manhattan' (Complaint ¶21) by acquiring stock in plaintiff." (117a).

This apparently led the court below erroneously to consider that distribution of motion pictures generally was involved in this case.

As stressed above, pp. 6 - 12, this is not a civil antitrust case to recover damages for antitrust violations. It is a case to enjoin the illegal take-over of Cinema 5 by Forman and the corporations he owns and controls.

Since the cases are unrelated, there can be no reasonable anticipation that future confidential communications will be inhibited in the Western District cases. See Hull, supra at 2546. Any doubt on that score has been dispelled by the defendants themselves in pushing ahead Consolidated's derivative action and stockholders' list proceeding. If Webster Sheffield's presence there does not inhibit them, Webster Sheffield's presence here cannot. It is unfair and an abuse of discretion to disqualify Webster Sheffield in this case on the suggestion of future inhibition when defendants have waived this very claim of inhibition in the other actions. Cinerama and the other defendants are not concerned about any future inhibitions in the relatively minor Western District cases, a questionable probability in any event since the Buffalo firm also represents National General Pictures Corporation, a competitor of Cinerama, in the same cases.

We submit that the court below misread General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974) on which it relied heavily (119a, 146a-147a, and 161a) and applied a vague standard of the appearance of impropriety rather than the more objective "substantially related" test which was clearly stated

in General Motors* and reaffirmed and clarified in Silver Chrysler. Even though disqualification motions are addressed to the discretion of the district court, it would be intolerable if every district court judge were to decide such motions on his personal appreciation of a standard as vague as "the appearance of professional impropriety." This Court has stated clearly these ethical problems should not be resolved in such a vacuum but in the framework of the "substantially related" test. Silver Chyrsler, supra at 3672 and 3674. The record below establishes conclusively that the "substantially related" test has not been met by defendants. Moreover, the record below conclusively establishes that the defendants themselves understand there is no conflict between the Buffalo firm and Webster Sheffield, but used this motion to disqualify to obtain a tactical advantage in delaying Cinema 5's case while at the same time pressing ahead with their own actions.

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* This Court found that the actions in General Motors were sufficiently similar to be the same matter. Silver Chrysler, supra at 3676.

There is no conflict between Cinema 5's right to be represented by counsel of its own choice and the need to maintain the highest ethical standards of professional responsibility and the scrupulous adminstration of justice. Defendants' crocodile tears, allowed to flow freely in this case but conveniently restrained in the actions brought by them, should be of no avail where there is no substantial relationship between the representations in issue.

CONCLUSION

For the reasons stated above, there is no basis for disqualifying plaintiff's counsel and the Order of the court below should be reversed.

Respectfully submitted,

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Service of three (3) copies of

the within Brief is hereby admitted this

6th day of June, 1975

Phillips, Nagel, Benjamin, Kane & Ballon

Attorneys for Resp't